

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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In re NASSAU COUNTY STRIP  
SEARCH CASES

AMENDED MEMORANDUM AND ORDER<sup>1</sup>

99-CV-3126 (DRH)  
99-CV-2844 (DRH)  
99-CV-4238 (DRH)

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A P P E A R A N C E S:

For Plaintiffs:

Herbst Law PLLC  
420 Lexington Avenue - Suite 300  
New York, New York 10170  
By: Robert L. Herbst, Esq.

Giskan Solotaroff Anderson & Stewart LLP  
11 Broadway Suite 2150  
New York, New York 10004  
By: Iliana Konidaris, Esq.

Beldock Levine & Hoffman LLP  
99 Park Avenue, Suite 1600  
New York, New York 10016  
By: Jonathan C. Moore, Esq.

Emery Celli Brinckerhoff & Abady LLP  
75 Rockefeller Plaza, 20<sup>th</sup> Floor  
New York, New York 10019  
By: Matthew D. Brinckerhoff, Esq.

Wolf Haldenstein Adler Freeman & Herz, LLP  
270 Madison Avenue  
New York, New York 10016  
By: Jeffrey G. Smith, Esq.

For Defendants:

Nassau County Attorney's Office  
Carnell T. Foskey  
Acting County Attorney  
One West Street  
Mineola, New York 11501  
By: Liora M. Ben-Sorek, Esq.

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<sup>1</sup> The Memorandum and Order dated April 2, 2014 has been amended solely to replace the words in footnote 10, "is presently Senior Counsel to the law firm of Giskan Solotaroff Anderson & Stewart LLP," with "was Senior Counsel to the law firm of Giskan Solotaroff Anderson & Stewart LLP at the time of the filing of the motion." See footnote 11, infra.

HURLEY, Senior District Judge

Pending before the Court is plaintiffs' motion, made pursuant to Federal Rules of Civil Procedure 23(h) and 54(d) (2) for counsel fees in the amount of \$5,754,000, plus costs and expenses of \$182,030.25, for a total of \$5,936,030.25. In addition, plaintiffs seek to recover service awards for those class members who were deposed during pretrial discovery and/or testified at trial.

Defendants oppose plaintiffs' applications, arguing (1) the fees sought are excessive, (2) counsels' time records are inadequate, (3) the proposed hourly rates are excessive, (4) service awards are unavailable under New York State law, and (5) that "because plaintiffs' federal claims were dismissed and the only remaining claims are pendent state law claims, the class definition and applicable class period must be redefined."

(Defs.' Br. in Opp'n at i (the "TABLE OF CONTENTS ") (original all in upper case).)

#### BACKGROUND

The plaintiffs' class consists of 17,000 individuals who were strip searched during the class period<sup>2</sup> upon their admission to the Nassau County Correctional Center ("NCCC") for misdemeanor or lesser offenses absent reasonable suspicion that

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<sup>2</sup> The class period extends from May 20, 1996 until and including June 1, 1999.

they harbored contraband. Some of those individuals were arrested and admitted to the NCCC more than once so that the total of the subject strip searches exceeds the number of class members.

The case has been hotly contested for over thirteen years. The particularly salient portions of its extended history are accurately synopsized by plaintiffs thusly:

These consolidated lawsuits were brought by 10 named plaintiffs and class representatives who were all strip searched upon admission at the Nassau County Correctional Center ["NCCC" or "Jail"] without reasonable suspicion and without even a reasonable suspicion inquiry. The actions were brought after the undersigned had obtained a decision from another judge of this Court that the blanket strip search policy at the NCCC was unconstitutional. See Shain v. Ellison, 53 F. Supp. 2d 564 (E.D.N.Y. 1999). For years thereafter, defendants took the position that Shain was wrongly decided, and vigorously pressed their appeal through the Second Circuit, which several years later affirmed by a divided panel. Shain v. Ellison, 273 F.3d 56 (2d Cir. N.Y. 2001). Defendants' petition for certiorari was denied. Nassau County v. Shain, 573 U.S. 1083 (2002).

Meanwhile, plaintiffs here were seeking class certification in the District Court. Ultimately, there were three unsuccessful motions for class certification in the District Court, and two unsuccessful interlocutory appeals to the Second Circuit. After Shain was confirmed on appeal, defendants unequivocally conceded

liability<sup>3</sup> to the class as [an arguable] stratagem to avoid class certification and succeeded in obtaining another denial of class certification. Finally, in July 2005, after settling the individual claims of the 10 named plaintiffs for a total of \$350,000, plaintiffs had a final judgment appealable as of right. The Second Circuit reversed and ordered class certification on liability and reconsideration of class certification on damages. Augustin v. Jablonsky (In re Nassau County Strip Search Cases), 461 F.3d 219 (2d Cir. 2006).

With the class now certified as to liability, plaintiffs obtained summary judgment on liability in favor of the class and each of its members, again on consent of the defendants without caveat or conditions, reservations or qualifications. Plaintiffs then sought certification on damages. In response to the Court's concerns that a common damages issue was lacking, plaintiffs argued and ultimately persuaded the Court that an unconstitutional strip search necessarily entailed an injury to human dignity, and that this injury was common to the class with respect to both causation and some of the resulting damages sustained. Accordingly, in a March 27, 2008 decision, the Court certified the class for damages.

(Pls.' Mem. in Supp. at 5-6.)

After the March 27, 2008 decision, further efforts to settle the case were pursued, additional discovery was conducted, and various motions were made by parties concerning such issues

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<sup>3</sup> In defendants' November 4, 2003 concession letter, defendants conceded liability "for all purposes in this action against all remaining defendants." (Case No. 99 CV 3126, Docket No. 43.) As a result, summary judgment as to liability was entered against defendants on behalf of the "class and each and every member thereof." (Case No. 99 CV 2844, Docket No. 122.)

as the rules and procedures to be employed during this apparently unprecedented general, as distinct from special, damages segment of the class action proceeding.

Returning to the history of the case as provided by plaintiffs:

On the eve of trial, the parties agreed to waive a jury, and the trial proceeded before the Court, over 11 trial days. [Proposed findings of fact and conclusions of law and post-trial briefing were all completed by April 2010. In a . . . decision on September 22, 2010, the Court issued findings of fact and conclusions of law and awarded class members \$500 in human dignity damages for each unlawful strip search he or she sustained. In re Nassau County Strip Search Cases, 742 F. Supp. 2d 304 (E.D.N.Y. 2010).

Extensive . . . briefing followed on how to handle the second damages phase of the case, and whether those damages could be handled and resolved on a class-wide basis. On October 19, 2011, the Court determined that it would subsequently enter a judgment decertifying the class for [special damages purposes], leaving it to each class member individually to pursue emotional distress and economic loss damages, by using the summary judgment on liability obtained for the class to commence their own lawsuits for such damages. Augustin v. Jablonsky, 2011 U.S. Dist. LEXIS 121000 (E.D.N.Y. Oct. 19, 2011).

(Pls'. Mem. in Supp. at 7.)

Following plaintiffs' current post-trial application for counsel fees and other items of relief being filed, the Supreme Court issued its decision in Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 132 S. Ct. 1510 (2012) which

held that the strip searching of a detainee charged with a misdemeanor or lesser offense as part of the standard intake procedure at a correctional facility, even absent reasonable suspicion to believe that he or she harbors contraband, is not violative of the Fourth or Fourteenth Amendment.

Based on the holding and rationale in Florence, defendants moved to (1) vacate their earlier unconditional concession of liability and the resulting Court orders, and (2) dismiss the entire suit, i.e. both the federal and state constitutional claims.

By Memorandum and Order dated July 18, 2013, defendants' Florence-based application was granted to the extent that the portion of the January 16, 2007 Order granting summary judgment as to liability on plaintiffs' § 1983 claim was vacated and the underlying federal claim dismissed. However, their motion was denied as to the cause of action based on Article 1, § 12 of the New York State Constitution. The viability of that claim is not dictated by Florence contrary to the position urged by defendants. See In re Nassau Cnty. Strip Search Cases, 958 F. Supp.2d 339, 354 (E.D.N.Y. 2013).

It may be that the New York Court of Appeals will at some point be asked by the Second Circuit via a Rule 27.2 certification request to answer questions about such matters as the effect of Florence, if any, upon the legality of the type of

strip searches under discussion under Article I, Section 12 of the New York State Constitution. Of course, it is not a foregone conclusion that the position of the State's highest court will mirror that of their counterparts in Washington even though the language of the federal and state constitutional provisions are the same. See generally 31 Carmody-Wait 2d § 173:254 ("Although the language of the Fourth Amendment is identical to words found in the Bill of Rights of the New York State Constitution, judicial interpretation of these words by the United States Supreme Court and the New York Court of Appeals have begun to diverge significantly on important search and seizure issues.") (internal citations omitted). However, the possible need for certification does not warrant abandoning the supplemental jurisdiction exercised by this Court over these many years in view of the advanced stage of the proceeding. See Motorola Credit Corp. v. Uzan, 388 F.3d 39, 56 (2d Cir. 2004).

Given that I have retained jurisdiction, the award of \$500 per strip search, *inter alia*, remains intact.

APPLICATION FOR ATTORNEYS' FEES AND  
FOR REIMBURSEMENT FOR COSTS AND EXPENSES

I. Applicable Legal Principles Concerning Legal Fees  
in Common Fund Class Actions

As explained by the Second Circuit in Goldberger v. Integrated Res., Inc.:

From time immemorial it has been the rule

in this country that litigants are expected to pay their own expenses, including their own attorneys' fees, to prosecute or defend a lawsuit. There is a salient exception to this general rule that applies where an attorney succeeds in creating a common fund from which members of a class are compensated for a common injury inflicted on the class. In that situation, the attorneys whose efforts created the fund are entitled to a reasonable fee - set by the court - to be taken from the fund. The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost. Courts have used two distinct methods to determine what is a reasonable attorneys' fee.

The first is the lodestar, under which the district court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate. Once that initial computation has been made, the district court may, in its discretion, increase the lodestar by applying a multiplier based on "other less objective factors," such as the risk of the litigation and the performance of the attorneys. Id. (internal quotation marks omitted).

The second method is simpler. The court sets some percentage of the recovery as a fee. In determining what percentage to award, courts have looked to the same "less objective" factors that are used to determine the multiplier for the lodestar.

209 F.3d 43, 47 (2d Cir. 2000) (internal citations omitted).

Either approach may be utilized in calculating



attorneys' fees, id. at 50,<sup>4</sup> although "[t]he trend in this Circuit is toward the percentage method" in that it avoids the "tempt[ation of] lawyers to run up their hours," lessens the need for "district courts to engage in a gimlet-eyed review of line-item fee audits," and "directly aligns the interests of the class and its counsel." Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 121 (2d Cir. 2005) (citation and quotation marks omitted).

"It bears emphasis [, however,] that whether calculated pursuant to the lodestar or the percentage method, the fees awarded in common fund cases may not exceed what is 'reasonable' under the circumstances." Goldberger, 209 F.3d at 47. As a guide to assist district courts in making that overriding determination, the Circuit has identified the following factors for consideration: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . .; (4) the quality of representation; (5) the requested fee in relation to the [recovery achieved]; and

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<sup>4</sup> The same two methods are also utilized under the law of the State of New York. See, e.g., Flemming v. Barnwell Nursing Home and Health Facilities, Inc., 56 A.D.3d 162, 165 (3d Dep't 2008), aff'd, 15 N.Y.3d 375 (2010); Fiala v. Metro. Life Ins. Co., 27 Misc. 3d 599, 611 (Sup. Ct. N.Y. Co. 2010). Parenthetically, Flemming was partially overruled on another ground by a 2011 amendment to CPLR Rule 909, as indicated in the practice commentaries to that Rule. See Alexander, Practice Commentaries, McKinney's CPLR Rule 909.

(6) public policy considerations." Id. at 50 (citation and quotation marks omitted). Henceforth, these factors will be referred to collectively as the "Goldberger factors."

II. Calculation Method Requested by Plaintiffs  
and Utilized by Court

Plaintiffs request that counsel fees be awarded based on a percentage of the common fund created for the benefit of the class with a lodestar cross-check to assure reasonableness. An appropriate percentage, plaintiffs posit, would be "50% of the . . . aggregate class damages award." (Pls.' Mem. in Supp. at 3.)

Defendants recognize that plaintiffs' proffered methodology is appropriate as a general matter. (Defs.' Br. in Opp'n at 2 ("On July 18, 2013, . . . this Court . . . dismissed the class Plaintiffs' Federal law claims. . . . By reason thereof, § 1988 is inapplicable and no attorneys' fees may be awarded to Class Counsel under the fee-shifting statute. What remains, then, is an analysis of attorneys' fees under either the 'presumptively reasonable fee' (i.e. modified lodestar) method, or the 'percentage of the fund' method.").)

The Court will use plaintiffs' suggested method. Since that method implicates both the percentage approach, as well as the lodestar method, albeit only as a cross-check, both warrant further discussion.

III. Additional General Observations About Percentage  
Method With Lodestar Cross-Check Enhanced by Multiplier

A. Percentage Based on Total Amount Recovered

The percentage method, as already defined, is largely self-explanatory. However, it is important to note that the percentage is applied to the total amount recovered on behalf of the class (i.e. the "common fund"), not to the lesser sum that in all probability will be claimed by members of the class from that fund. Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) ("[T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."); see also Velez v. Novartis Pharm. Corp., 2010 WL 4877852, at \*21 (S.D.N.Y. Nov. 30, 2010) ("[T]his Circuit has ruled that '[a]n allocation of fees by percentage should therefore be awarded on the basis of total funds made available **whether claimed or not.**'") (emphasis in original) (quoting Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 437 (2d Cir. 2007)). The amount of the common fund here is \$11,508,000, derived from multiplying the number of subject strip searches, viz. 23,016, by the general damage award of \$500 per strip search.

B. Caveats Regarding Use of Percentage Method

Although utilization of the percentage method in setting counsel fees in common fund cases may be the "trend in [the] Circuit," the practice is not without pitfalls. Wal-Mart

Stores, Inc., 396 F.3d at 121. As mentioned in Goldberger:

[E]ven a theoretical construct as flexible as a 'benchmark' seems to offer an all too tempting substitute for the searching assessment that should properly be performed in each case. Starting an analysis with a benchmark could easily lead to routine windfalls where the recovered fund runs into the multi-millions. Obviously, it is not ten times as difficult to prepare, and try or settle a 10 million dollar case as it is to try a 1 million dollar case.

209 F.3d at 52 (citation and internal quotation marks omitted).

C. Law Pertaining to Plaintiffs' Request for a Multiplier of the Lodestar Amount

As earlier noted, the lodestar method requires "the district court [to] scrutinize[] the fee petition to ascertain the number of hours reasonably billed to the class and [to] then multipl[y] that figure by an appropriate hourly rate." Goldberg, 209 F.3d at 47. To the resulting sum, "enhancements may be awarded in rare and exceptional circumstances." Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 552 (2010) (citations and internal quotation marks omitted). The lodestar may be increased, in the Court's discretion, "based on factors such as the riskiness of the litigation and the quality of the attorneys." Wal-Mart Stores, Inc., 396 F.3d at 121.

Plaintiffs are requesting that the unadjusted lodestar be enhanced by a 1.29 multiplier which, they argue

[is] an extremely modest multiplier when considering the framework of multipliers

commonly approved in this Circuit in other common fund percentage-of-recovery cases, where multipliers ranging from 2 to 5.5 and higher are acceptable and routinely awarded. [citing Wal-Mart Stores v. Visa USA, Inc., 396 F.3d at 123.]

(Pls.' Mem. in Supp. at 3.) That request will be addressed later in the text.

IV. May 20, 1999 is the Commencement Date for Computing Counsel Fees and Costs, not July 5, 2005 as Urged by Defendants

As noted, plaintiffs seek counsel fees and expenses incurred from May 1999 through January 13, 2012, explaining that "[o]ne advantage of using the percentage-of-recovery method and a positive multiplier to award an enhanced fee rather than [the] lodestar might be to avoid the need to make successive fee applications for this future work." (Pls.' Mem. in Supp. at 8 n.4.)

Defendants maintain that counsel fees and costs incurred for the period from "May 20, 1999 through July 5, 2005" may not exceed \$125,000.00. (Defs.' Br. in Opp'n at 7.) The proffered reason for their position is that the parties settled the claims of the ten individual plaintiffs named in the then consolidated actions on July 5, 2005, agreeing that the maximum attorneys fees that could be collected for the period from the commencement of the action until the date of settlement was \$125,000. (Id.) However, as plaintiffs aptly point out, "[t]he

\$125,000 cap on attorneys fees was a negotiated term of the settlement for the individual claims and only if the Second Circuit did not later grant class certification on appeal."

(Pls.' Reply at 3-4 (emphasis in original).) That precondition to the cap did not occur, thus rendering the subject provision meaningless for present purposes.

To the extent defendants claim that the \$125,000 figure constitutes some type of admission that "the reasonable value of attorneys' fees and costs" during that time frame was \$125,000 or less, Defs.' Br. in Opp'n at 7, plaintiffs emphasize that defendants, and understandably so, presumably declined to factor into the settlement negotiations plaintiffs' then unsuccessful efforts to obtain class certification. (Pls.' Reply at 4.) Indeed, although the class was not certified until years later, plaintiffs' counsel sought class certification from the outset of the litigation in May 1999.

In sum, defendants' position that counsel fees and costs should only be determined from July 5, 2005 lacks merit. Instead, the May 20, 1999 date will be used as the starting point for calculation purposes.

V. Defendants' Objections to Plaintiffs' Billing Records

Defendants object to the general format of plaintiffs' billing records and also find fault with certain specific aspects of their submissions. Although there is a significant overlap

between the two categories, an effort will be made to address each separately.

A. General Objection to Billing Records

Defendants contend that the billing records submitted by plaintiffs are as a general matter insufficiently detailed to permit an award of counsel fees.<sup>5</sup> The legitimacy of that claim is largely dispelled by a perusal of the detailed billing records which provide adequate information for the Court to determine hourly rates for the various service providers consistent with the Goldberger criteria. That is not to say that plaintiffs' materials are devoid of shortcomings. Such is not the case. For example, the "FEE SUMMARY" submitted by Emery Celli Brinckerhoff & Abady LLP, has eleven individuals listed under the "LAWYER" column as having worked on the case. See Tab 5 to binder entitled "Time Records, In Camera Review."<sup>6</sup> Reference to the March 19, 2012 Declaration of Matthew D. Brinckerhoff shows that

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<sup>5</sup> The billing records consist of (1) the time records maintained by each of the five firms participating in the representation of the class, which records list the date, time expended, and nature of the service provided by each attorney or paralegal as the case may be who worked on the case ("service provider") (identified by his or her initials), and (2) the concomitant Declarations of Attorneys Herbst, Smith and Brinckerhoff which - subject to some notable exceptions to be discussed in the text, infra - provide the names, together with background information, of the individual service providers.

<sup>6</sup> Notwithstanding the "in Camera Review" portion of the caption, the records were made available to defendants pursuant to a subsequent court order.

three of those service providers were "paralegals" for whom no background or other pertinent information is provided. More importantly, background information is provided in the Declaration for only two of the eight attorneys listed, viz. Mr. Brinckerhoff and Ms. Wang. However, that gap is not a major problem since (1) the work of those two attorneys comprise approximately 90% of that firm's attorney hours, and (2) of the other six "LAWYER[S]," reference to the firm's website provided in paragraph 4 of the Declaration gives the background and partnership status of four, leaving only two lawyers insufficiently identified to permit a full assessment of the value attributable to their hours of service. As to those two lawyers, their billing rates suggest they are probably partners. Nonetheless given absence of other information, each has been treated as an associate. For the paralegals, the base hourly rate of \$70 for that classification has been assigned.<sup>7</sup> To the extent the billing submissions of other class counsel suffer from similar insufficiencies, the same methodology of adjusting billing rates will be applied. Gagasoules v. MBF Leasing LLC, 2013 WL 1760134, at \*4 (E.D.N.Y. Apr. 24, 2013); and Prot. One Alarm Monitoring, Inc. v. Exec. Prot. One Sec. Serv., LLC, 553 F. Supp. 2d 201, 209 (E.D.N.Y. 2008) ("Where the moving party fails

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<sup>7</sup> See p. 23, infra.



to provide information on the attorneys' and paralegals' backgrounds and experience, courts have used their discretion to award fees at a rate lower than requested.").

B. Specific Objections to Billing Records

Defendants also maintain that plaintiffs' billing records are inadequate in a number of particulars, including (1) "[c]ounsel's' fee application . . . do[es] not specify whether the applied billing rate takes into consideration the levels of the attorneys' experience over the course of the litigation," citing Williams v. N.Y.C. Hous. Auth., 975 F. Supp. 317 (S.D.N.Y. 1997), (Defs.' Br. in Opp'n at 8), (2) the information provided in most instances consists of the employees' names or initials, the total hours worked, and the hourly rates, but is typically absent any information as to "whether [a particular] employee was a junior or senior partner, [or] junior or senior associate," id. at 9, and (3) "whether an employee['s] change in title [if any, during the course of the litigation] has been taken into account in determining the appropriate fees charged." Id. at 9-10.

As a further particularized example of the billing inadequacies charged to plaintiffs, defendants refer to the sums assessed for travel time to and from the court. Plaintiffs object in that "it [is] not . . . possible to determine whether the attorneys and paralegals distinguished the rates for travel time from the full hourly rates." Id. at 9. In that regard,

defendants cite Barfield v. N.Y.C. Health and Hosps. Corp., 537 F.3d 132, 139, 151 (2d Cir. 2008) for the proposition that travel time, pursuant to local court custom, should be charged at half of counsel's hourly rate rather than at the full rate.

With respect to defendants' first-listed specific objection, supra, concerning a lack of detail as to "the levels of the attorneys' experience over the course of the litigation," the Court has perused the Williams case. There the Court, in the exercise of its discretion - after deciding to apply "current rather than historic [hourly] rates" - held that it was not prepared to employ the same methodology concerning counsels' "level of experience." Williams, 975 F. Supp. at 322. "Instead, their hourly rates should reflect the passage of time and the corresponding development of each attorney's expertise." Id. Therefore, "rather than assign hourly rates based on each attorney's current level of experience, the [Williams] Court . . . determine[d] hourly rates based on the average of each attorney's level of experience throughout the course of the litigation." Id. at 323.

Williams was a Section 1983 class action seeking injunctive relief against the New York City Housing Authority's methods of terminating rent assistance. Id. at 319. Plaintiffs, as the prevailing parties, sought counsel fees pursuant to 42 U.S.C. § 1988 based on a lodestar calculation. Id. at 319, 321.

Here, in contrast, the lodestar method is being used merely as a cross-check against the percentage method. Under such circumstances, "the hours documented by counsel need not be exhaustively scrutinized by the district court." Goldberger, 209 F.3d at 50; see also In re Telik, Inc. Sec. Litig., 576 F. Supp. 2d 570, 585-86 (S.D.N.Y. 2008); In re Elan Sec. Litig., 385 F. Supp. 2d 363, 373 (S.D.N.Y. 2005). Moreover, given that approximately twenty-five attorneys worked on the present class action at different points for over a decade, the Court, in the exercise of its discretion, declines the invitation to adopt the methodology used in Williams. Instead, I will use the current, unadjusted hourly rates charged by the various attorneys in determining counsel fees in recognition of the fact that counsel did not receive any interim payments during the course of the litigation. See, e.g., Grant v. Martinez, 973 F.2d 96, 100 (2d Cir. 1992); Velez, 2010 WL 4877852, at \*23 ("The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation.") (quoting In re Veeco Sec. Litig., 207 U.S. Dist. LEXIS 16922, at \*9 n.7 (S.D.N.Y. 2007)).

As to defendants' complaint about the failure of plaintiffs' billing records to distinguish between senior and junior partners as well as junior and senior associates, that

purported inadequacy is partially cured by the resumes that have been provided by movants. However, given the exemplary caliber of the legal services rendered to the class, I have assigned a \$300 per hour rate for the services of all associates with two exceptions those being where the requested rate was below \$300. Similarly, for the same reason, the hourly rate assigned to all partners is \$450.

VI. Calculation of Lodestar Cross-Check With Respect to Plaintiffs' Request for Counsel Fees

A. Eastern District Hourly Rates Apply

Plaintiffs posit that the "hourly [rates] charged by Mr. Herbst (\$750) and other senior lawyers in this case are reasonable." (Pls' Mem. in Supp. at 17.) That is so, counsel explains, "because this is a case where higher Southern District hourly rates may be applied." (Id.) For that proposition, several cases are cited by plaintiffs, including Vilkhu v. City of N.Y., 2009 U.S. Dist. LEXIS 73696 (E.D.N.Y. June 26, 2009) (using Southern District hourly rates in an Eastern District case in establishing the lodestar fee in a non-class civil action).

However, as a preliminary matter, the Court notes that Vilkhu was vacated on appeal on the very ground that the District Court had "calculated the attorney's fees award by reference to billing rates in the Southern District." 372 F. App'x. 222, 223-

24 (2d Cir. 2010). The Second Circuit's decision to vacate the District Court's attorney's fees award was based upon its decision in Simmons v. N.Y.C. Transit Auth., 575 F.3d 170 (2d Cir. 2009), which is discussed infra. See id.

"An attorney's hourly rate is considered reasonable when it is 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonable comparable skill, experience, and reputation.'" Mawere v. Citco Fund Servs., (USA) Inc., 2011 WL 6779319, at \*3 (S.D.N.Y. Sept. 16, 2011) (quoting Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984)), report and recommendation adopted, 2011 WL 6780909 (S.D.N.Y. Dec. 27, 2011). For present purposes, "the community" is the Eastern District, not the Southern District of New York as urged by plaintiffs. As explained by the Second Circuit in Simmons:

[W]hen faced with a request for an award of higher out-of-district rates, a district court must first apply a presumption in favor of application of the forum rule. In order to overcome that presumption, a litigant must persuasively establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result. In determining whether a litigant has established such a likelihood, the district court must consider experience-based, objective factors. Among the objective factors that may be pertinent is counsel's special expertise in litigating the particular type of case, if the case is of such nature as to benefit from special

expertise. A litigant cannot overcome the presumption through mere proximity of the districts, nor can a litigant overcome the presumption by relying on the prestige or "brand name" of her selected counsel. . . . [Instead,] the party seeking the award must make a particularized showing, not only that the selection of out-of-district counsel was predicated on experience-based, objective factors, but also of the likelihood that the use of in-district counsel would produce a substantially inferior result."

575 F.3d at 175-76.

Although plaintiffs' counsel are clearly highly skilled and knowledgeable members of our profession, movants have failed to demonstrate that, objectively viewed, the use of practitioners from this District would likely have produced a substantially inferior result. The mere fact that Mr. Herbst, of the plaintiffs' team, was the attorney who handled the threshold litigation in Shain,<sup>8</sup> while significant, falls far short of being dispositive of the issue. To begin with, Shain was not a class action. Moreover, the legal principles implicated in that litigation are readily understandable, and thus easily transferrable to other strip search scenarios by competent counsel.

B. Hourly Rates Sought by Class Counsel and  
Reasonable Forum Rates for Comparable Services

Plaintiffs have requested hourly rates from \$400 to

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<sup>8</sup> See history of the Shain litigation supra at pp. 3-4.

\$790 for partners, between \$285 and \$475 for associates, from \$125 to \$290 for paralegals, and \$100 for "interns and law students."<sup>9</sup> (Herbst Decl. at 8; Smith Decl.) However, as noted, forum rates apply here, not the generally higher rates found in the Southern District of New York where each of the five firms which have participated in the representation of the class are located. The question, then, is what are the prevailing market rates required in this community for similar legal services provided by attorneys and paralegals of comparable skill, experience and reputation given the totality of the circumstances, including the nature of the case and other relevant considerations. 1st Bridge LLC v. 682 Jamaica Ave., LLC, 2010 WL 4608326, at \*5 (E.D.N.Y. Jul. 13, 2010), report and recommendation adopted, 2010 WL 4607409 (E.D.N.Y. Nov. 4, 2010). In making that determination, the court may "rely on the hourly rates awarded in comparable actions in Eastern District opinions and on its own knowledge of the prevailing rates in this district." Ferrari v. Prof. Pavers Corp., 2013 WL 1212816, at \*5 (E.D.N.Y. Mar. 23, 2013).

The legal representation provided to the class has been first rate. To obtain such services locally would likely require the following hourly sums: \$300 to \$450 for a partner, \$200 to

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<sup>9</sup> Given the dearth of information about the "interns and students," an award for their services is not warranted.

\$300 for an associate, and \$70 to \$90 for a paralegal. See Gagasoules v. MBF Leasing LLC, 2013 WL 1760134, at \*3 (E.D.N.Y. Apr. 24, 2013); see also Gesualdi v. Deland Contracting, Inc., 2013 WL 4807080, at \*5 (E.D.N.Y. Sept. 9, 2013); Pilitz v. Inc. Vill. of Freeport, 2011 WL 5825138, at \*4 (E.D.N.Y. Nov. 17, 2011).

C. Hours Expended

As earlier discussed, defendants leveled a number of complaints - both general and specific - against plaintiffs' billing records. However, it will be noted that those complaints do not target the number of hours claimed per se.<sup>10</sup>

The records submitted by plaintiffs demonstrate that the five firms involved in representing the class devoted a total of 8,588.83 hours to the task. See supporting Declarations submitted by (1) Robert L. Herbst (on behalf of Giskan, Solotaroff Anderson & Stewart LLP, Beldock Levine & Hoffman LLP,

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<sup>10</sup> As noted earlier in the text, defendants maintain that it is unclear whether plaintiffs are billing their full hourly rates for travel to and from the courthouse rather than the customary fifty percent of that rate. That complaint is unaccompanied, however, by the identity of the subject entries either by firm, date, total sum involved, or otherwise. The Court declines defendants' implicit invitation to peruse the literally thousands of billing entries to fill this specificity void in the presentation of their argument since the lodestar is being computed solely as a cross-check.



and Herbst & Greenwald LLP),<sup>11</sup> (2) by Jeffrey G. Smith (on behalf of Wolf Haldenstein Adler Freeman & Herz LLP), and (3) by Matthew D. Brinckerhoff (on behalf of Emery Celli Brinckerhoff & Abady LLP).

D. Lodestar Calculations Based on Hours Expended  
and Adjusted Hourly Rates

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By way of format, I have taken the billing charts submitted by each of the five class counsel law firms - listing such items as the names of the service providers, the hours devoted to the case, the requested hourly rates, and the corresponding total sums requested - and modified those charts (1) to indicate whether the attorney involved is a "partner," or an "associate" in those situations where that needed information is absent from a chart and is also decipherable from other materials provided such as resumes and firm websites, and (2) to provide the hourly rates established by the Court in lieu of the rates requested, along with the corresponding total sums.

Giskan Solotaroff Anderson & Stewart LLP

Firm	Name	Position	Specific Position	Total Hours	Rate	Total
GSAS	Robert L. Herbst	Attorney	Partner	1,496.80	\$450.00	\$673,560.00

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<sup>11</sup> While Robert L. Herbst was Senior Counsel to the law firm of Giskan Solotaroff Anderson & Stewart LLP at the time of the filing of the motion, prior to June 2009, he was a senior partner in the law firm of Beldock Levine & Hoffman LLP, and prior to October 28, 2002, he was a partner in the law firm of Herbst & Greenwald LLP. (See Herbst Decl. at 1.)

GSAS	Oren Giskan	Attorney	Partner	67.70	450.00	30,465.00
GSAS	O. Iliana Konidaris	Attorney	Associate	42.40	200.00	8,480.00
GSAS	Dustin Brockner	Paralegal		355.90	70.00	24,913.00
GSAS	Shira Burton	Paralegal		610.30	70.00	42,721.00
GSAS	TAC	Paralegal		38.40	70.00	2,688.00
GSAS	Rahul D'Sa	Paralegal		15.70	70.00	1,099.00
GSAS	IMG	Paralegal		40.60	70.00	2,842.00
GSAS	Kate Redburn	Paralegal		30.20	70.00	2,114.00
<b>TOTAL</b>				2,698.00		\$788,882.00

**Beldock Levine & Hoffman LLP**

<b>Firm</b>	<b>Name</b>	<b>Position</b>	<b>Specific Position</b>	<b>Total Hours</b>	<b>Rate</b>	<b>Total</b>
BLH	Robert Herbst	Attorney	Partner	467.00	\$450.00	\$210,150.00
BLH	Jonathan Moore	Attorney	Partner	48.65	450.00	21,892.50
BLH	Vera Scanlon	Attorney	Partner	1,370.60	450.00	616,770.00
BLH	Spencer Freedman	Attorney	Associate	440.50	300.00	132,150.00
BLH	Sofia Yakren	Attorney	Associate	79.15	300.00	23,745.00
BLH	Marc Cannan	Paralegal		13.80	70.00	966.00
BLH	Julie Russell	Paralegal		136.90	70.00	9,583.00
BLH	Joani Pattarozzi	Paralegal		22.95	70.00	1,606.50
BLH	Interns & Law Students			193.00		
<b>TOTAL</b>				2,772.55		\$1,016,863.00

**Herbst & Greenwald LLP**

<b>Firm</b>	<b>Name</b>	<b>Position</b>	<b>Specific Position</b>	<b>Total Hours</b>	<b>Rate</b>	<b>Total</b>
H&G	Robert Herbst	Attorney	Partner	250.90	\$450.00	\$112,905.00
H&G	Gayle Pollack	Attorney	Associate	183.32	300.00	54,996.00
H&G	Amanda Masters	Attorney	Associate	18.00	300.00	5,400.00
H&G	Tori Marie Angeli	Paralegal		17.50	70.00	1,225.00
<b>TOTAL</b>				469.72		\$174,526.00

**Emery Celli Brinckerhoff & Abady LLP**

<b>Attorney</b>	<b>Specific Position<sup>12</sup></b>	<b>Total Hours</b>	<b>Rate</b>	<b>Total</b>
Matthew D. Brinckerhoff	Partner	172.9	\$450.00	\$ 77,805.00
Mariann Meier Wang	Partner	561.14	450.00	252,513.00
Nina Morrison	Associate	52.7	300.00	15,810.00
Richard D. Emery	Partner	13.2	450.00	5,940.00
Mary Kuder	Paralegal	71.4	70.00	4,998.00
Elizabeth Saylor	Partner	11.3	450.00	5,085.00
John R. Cuti	Associate	5.3	300.00	1,590.00
Scott Hoffer	Paralegal	14.75	70.00	1,032.50
Jonathan S. Abady	Partner	2.1	450.00	945.00
Katherine Rosenfeld	Partner	3.0	450.00	1,350.00
Kelly Stefanco	Paralegal	.8	70.00	56.00
<b>TOTAL</b>		908.59		\$367,124.50

**Wolf Haldenstein Adler Freeman & Herz, LLP**

<b>Attorneys/Paraprofessionals/Others</b>	<b>Hours</b>	<b>Rate</b>	<b>Total</b>
Daniel W. Krasner(P)	34.60	\$450.00	\$ 15,570.00
Jeffrey G. Smith(P)	629.60	450.00	283,320.00
Alan A.B. McDowell(OC)	636.60	300.00	190,980.00
John M. Cromwell(OC)	32.68	275.00	8,987.00
Martin E. Restituyo(A)	718.55	300.00	215,565.00
James A. Cirigliano(PL)	24.00	70.00	1,680.00
Joseph Weiss(PL)	66.80	70.00	4,676.00
Jillaine E. Gill(PL)	44.60	70.00	3,122.00
Kevin G. Cooper(PL)	13.00	70.00	910.00
<b>TOTAL</b>	2,200.43		\$724,810.00

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<sup>12</sup> From the materials submitted, Brinckerhoff and Wang are listed above as "partners." Moreover, reference to the websites provided in paragraph 4 of Brinckerhoff's March 19, 2012 Declaration, shows that Emery, Saylor, Abady and Rosenfeld are partners as well. Although the rates requested for the services of Morrison, and Cuti suggest their partnership status, rates alone are insufficient to warrant that conclusion absent other information. Accordingly, the latter two attorneys are treated as "associates."

The total unadjusted lodestar amount for the five firms is \$3,072,205.50

VII. Plaintiffs' Request for a Lodestar Multiplier

A lodestar amount represents a "presumptive[ly] reasonable[le]" attorneys' fee.<sup>13</sup> Millea v. Metro-North R.R. Co., 658 F.3d 154, 166 (2d Cir. 2011). As such, it is subject to an upward or downward adjustment by the district court if deemed necessary to reach an appropriate award.

Plaintiffs seek a relatively modest upward adjustment via a 1.29 multiplier. See Velez, 2010 WL 4877852, at \*23 ("Class counsel has requested a multiplier of 2.4 times the hourly fees already incurred. That multiplier falls well within (indeed, at the lower end) of the range of multipliers accepted within the Second Circuit."). As noted in Citigroup: "A multiplier is typically applied to the lodestar figure to represent the risk of litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." 2013 WL 6697822, at \*4 (emphasis added) (citation and internal quotation marks omitted).

"[L]itigation risk must be measured as of when the case

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<sup>13</sup> "[A] reasonable fee is an estimation of 'what a reasonable, paying client would be willing to pay, given that such a party wishes to spend the minimum necessary to litigate the case effectively.'" In re Citigroup Inc. Bond Litig., 2013 WL 6697822, at \*4 (S.D.N.Y. Dec. 19, 2013) (quoting Simmons, 575 F.3d at 174).

is filed." Goldberger, 209 F.3d at 55. Although at that time, plaintiffs had the benefit of the district court decision in Shain, the County was in the process of trying to have that decision overturned, mounting an argument that clearly could not be dismissed as patently without merit. Had plaintiffs not ultimately prevailed, no monies would have been received by their counsel either by way of fees or, in all probability, reimbursement for expenses incurred. The skill level of counsel was impressive and, while the complexity of plaintiffs' liability approach was relatively straight forward, their pivotal general damages argument was not only sound in my judgment, but one that less capable attorneys may not have considered.

For the reasons indicated, the base lodestar figure of \$3,072,205.50 has been enhanced by a multiplier of 1.29, resulting in an adjusted lodestar figure is \$3,963,145.00.

VIII. Consideration of Factors Listed in Goldberger v. Integrated Resources, Inc. (the "Goldberger factors") in Awarding a Reasonable Counsel Fee

The Goldberger factors are:

1. "the time and labor expended,"
2. "the magnitude and complexities of the litigation,"
3. the risks involved in the litigation,
4. the quality of the representation,
5. the requested fee in relation to the recovery obtained, and

6. "public policy considerations."

Goldberger, 209 F.3d at 50.

The factors are applicable to reasonableness determinations, whether a percentage of the common fund or the lodestar approach is used. McDaniel v. Cnty. of Schenectady, 595 F.3d 411, 423 (2d Cir. 2010). They are also applicable to multiplier requests. See Steinberg v. Nationwide Mut. Ins. Co., 612 F. Supp. 2d 219, 222 (E.D.N.Y. 2009). Accordingly, all but two of the Goldberger factors have already been addressed with respect to the multiplier determination supra. As to the two remaining, i.e. factors 5 and 6, and proceeding in reverse order, the effort to spare arrestees charged with non-felony offenses from the gross indignity of being strip searched upon entry to a correctional facility, absent reasonable suspicion that he or she harbors contraband, is a laudable litigation goal implicating major public policy concerns. And as to the last factor - the multi-million dollar recovery obtained and the concession of liability which remains in place as to the former class members' potential claims for special damages - that also has been taken into account by the Court in awarding what it believes to be a reasonable fee.

IX. Letters From Class Members Submitted in Response to Plaintiffs' Request for Counsel Fees

Notices were sent in November 2013 to class members of

counsels' request for attorneys' fees in the amount of \$5,754,000 and for \$182,030.25 by way of reimbursement for costs and expenses incurred. Responses from seven class members were received, with the common theme being the position that the amount sought was excessive. Parenthetically, given the assumption voiced by counsel for plaintiffs and for defendants on a number of occasions that the expected claim rate by class members against the common fund will likely fall short of 50%, the funds paid to class counsel in all probability will not, as a practical matter, diminish the amount paid to individual class members. Instead, those payments will probably be disbursed from the unclaimed portion of the \$11,508,000 total award. In any event, the Court has carefully considered the comments of each responding class member in fashioning its attorneys' fee award. However, the dollar amount of the award provided infra, and the reimbursement for costs and expenses, has not been effected.

X. Plaintiffs are Awarded \$3,836,000 in Counsel Fees,  
That Being a sum Equivalent to 33 $\frac{1}{3}$ % of the Total  
Amount Recovered on Behalf of the Class

Based on the total amount recovered on behalf of the class, considered in conjunction with (1) each of the previously discussed Goldberger factors, (2) the adjusted lodestar cross-check amount \$3,963,145.00 (i.e. \$3,072,205.50 unadjusted lodestar x 1.29 multiplier), and (3) percentages awarded in other instructive common fund cases, I find that a counsel fees award

of \$3,836,000 is reasonable. Accordingly, that sum is awarded to the five firms which represented the class. See, e.g., Cent. States Se. and Sw. Areas Health and Welfare Fund v. Cahn, 504 F.3d 229, 249 (2d Cir. 2007); In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig., 2014 WL 92465, at \*6 (E.D.N.Y. Jan. 10, 2014); Velez, 2010 WL 4877852, at \*21.

XI. Plaintiffs' Application for Reimbursement of Costs and Expenses Incurred is Granted

Class counsel indicates that among the five firms representing the class, total fees and expenses of "\$182,030.25" have been incurred. (Pls.' Mem. in Supp. at 22.) Neither the amount nor the items underlying that amount have been challenged, and the sums spent appear to have been necessary and reasonable.

"It is well-established that counsel who create a common fund . . . are entitled to the reimbursement of [all reasonable] litigation costs and expenses." In re Marsh Erisa Litig., 265 F.R.D. 128, 150 (S.D.N.Y. 2010). Accordingly, plaintiffs are awarded reimbursement in the amount requested, viz. \$182,030.25.

XII. Conclusion re Attorneys' Fees and Reimbursement for Costs and Expenses

Movants are awarded \$3,836,000 in attorneys' fees and \$182,030.25 for costs and expenses incurred for a total of \$4,018,030.25.



## PLAINTIFFS' APPLICATION FOR SERVICE AWARDS

The subject of service awards was discussed on several occasions over the years during status conferences. Indeed, the Court voiced the view during one such conference that it thought that class members who were deposed should receive \$2500, those who testified \$5000, and those who did both, \$7500. (Jan. 13, 2012 Tr. at 19.)

In response to my service award comments, two noteworthy events occurred. Firstly, plaintiffs' counsel referred to the July 5, 2005, Stipulation of Settlement resolving "the three consolidated cases" brought by "ten individual plaintiffs" based on the strip searches in issue. As part of that agreement, defendants stipulated that "if the denial of class certification [was] reversed on appeal," as it was, "defendants [would] not oppose plaintiffs' right to . . . (c) apply for compensation for their time and efforts as class representatives in an amount not to exceed \$1,000 per class representative." (May 5, 2005 Stip. of Settlement at ¶ 7.)

The second happening of note was that defendants asked for, and were granted permission to brief the subject before my inclination materialized into an order. As a result, the Court received defendants' January 20, 2012 letter outlining their position that the sums mentioned by the Court were excessive, and plaintiffs' January 25, 2012 reply which concluded thusly: "[w]e

respectfully reiterate our original request for \$5,000 and \$10,000 service incentive awards for deposed and testifying class members who were not named plaintiffs; if the Court is unwilling to grant them, there is certainly no legitimate reason to reduce further the Court's stated inclination to grant \$2,500 and \$5,000 respectively." (Pls.' Jan. 25, 2012 Ltr. at 5.)

As is evident from the foregoing, potential service award recipients fall into two categories: (1) those of the ten named plaintiffs who participated in the class action via being deposed, testifying at trial, or both; and (2) other class members who provided like services to the class.

At this juncture, a brief review of the applicable law on service awards is required. Service or "[i]ncentive awards are typically awards to class representatives for their often extensive involvement with a lawsuit." Hadix v. Johnson, 322 F.3d 895, 897 (6th Cir. 2003).

Service awards are not uncommon in federal class actions. See Bellifemine v. Sanofi-Aventis U.S. LLC, 2010 WL 3119374, at \*7 (S.D.N.Y. Aug. 6, 2010); Flemming, 56 A.D.3d at 166 (discussing federal service award cases). The situation appears to be otherwise, however, in New York. See Flemming, 56 A.D.3d at 166-67 ("New York law does not authorize incentive awards for named plaintiffs in class actions . . . The Legislature did not statutorily provide for incentive awards when

enacting CPLR Article 9, and we decline to create new law, leaving that policy determination within the purview of the Legislature");<sup>14</sup> see also In re Metlife Demutualization Litig., 689 F. Supp. 2d 297, 371 (E.D.N.Y. 2010); but see Fiala, 27 Misc. 3d at 611-12; Cox v. Microsoft Corp., 26 Misc. 3d 1220(A), at \*4 (Sup. Ct. N.Y. Co. 2007).

Here, of course, the federal class action no longer exists as a result of this Court's Florence-based decision of July 18, 2013. Thus, state law on service awards controls. That change in the legal landscape, inter alia, caused me to rethink my initial, albeit tentative, view on the subject and to advise counsel on January 29, 2014 that I was "reserv[ing] decision" on plaintiffs' subject application. (Jan. 29, 2014 Tr. at 7:17-25.) In any event, plaintiffs' request for service awards for class members falling within categories "1" and "2" supra, are denied for the following reasons: (1) the dismissal of the federal constitutional claim leaving solely the state-based cause of action; (2) the apparent unavailability of such awards under New York law; and (3) the absence of any information from movants concerning the concomitant costs or consequences, if any, to those class members who were deposed or testified at

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<sup>14</sup> To the extent service awards are unavailable in New York for "named plaintiffs," they obviously are also unavailable for the non-named plaintiff class members presently seeking such awards from this Court.

trial, thereby precluding an appropriate evaluation of their services. See, e.g., Flemming, 56 A.D.3d at 166 ("New York law does not authorize incentive awards for named plaintiffs in class actions. Federal Courts grant incentive awards where there are special circumstances, such as personal risk incurred by the plaintiff, exceptional time and effort expended in assisting class counsel, advancement of litigation expenses and acceptance of the risk of loss, or other similar burdens.") (internal citations omitted); In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig., 2014 WL 92465, at \*9 (E.D.N.Y. Jan. 10, 2014) ("Class Counsel are expected to provide, at a minimum, documentation setting forth the approximate value of each Class Plaintiff's claim and each one's proposed incentive award.")

DEFENDANTS' ARGUMENT THAT THE CLASS PERIOD MUST  
BE REDEFINED GIVEN THE DISMISSAL OF THE FEDERAL  
CONSTITUTIONAL CLAIM LACKS MERIT

Defendants' argument as to the captioned subject is, in toto, as follows:

There is no Federal statute of limitations for § 1983 actions. Instead, the Federal courts adopt the applicable State law limitations period for personal injuries. In New York State, that statutory period is three years. However, with the Federal claims being dismissed, this Court has determined that the only remaining claim is one for State law unlawful search and seizure - an intentional tort. Therefore, the proper statutory period to bring a claim is one year and ninety days [(apparently referring to the time limitation set forth in New York General

Municipal Law 50-i(1))].

Now, instead of a class period running from May 20, 1996 through June 1, 1999, the applicable statutory period should be from February 20, 1998 through May 20, 1999.

(Defs.' Br. in Opp'n at 13.)

Plaintiffs' response is twofold: (1) "defendants have made no showing that the statute of limitations on New York State Constitutional claims under Article I, Section 12 are not subject either to the three year statute of limitations for personal injury under CPLR 214 - the limitations statute from which the federal statute of limitations for § 1983 cases was derived, or the residuary six year statute of limitations of CPLR 213(1) (Pls.' Reply at 9 (citations omitted)), and (2) "even if arguendo defendants could show that the statute of limitations was less than three years, the statute of limitations defense is an affirmative defense that was waived, when defendants failed to raise it and conceded liability on the state law claim for the entire class 10 years ago." Id.

Plaintiffs' second point is dispositive and thus the identification of the applicable statute of limitation is purely academic and need not be resolved. As plaintiffs note, defendants conceded liability in early 2003. See, e.g., In re Nassau Cnty. Strip Search Cases, 461 F.3d at 224. That concession contained no limiting language or conditions. It

pertained to both the now dismissed first cause of action alleging a Fourth Amendment federal violation, as well as the second and sole remaining cause of action charging a violation of Article 1, Section 12 of the State Constitution.

In addition, a perusal of defendants' answer to the original complaint, as well as their later response to plaintiffs' amended complaint, discloses the total absence of any reference to General Municipal Law 50-i(1) or to any other state or federal statute of limitations. Simply put, that affirmative defense was never asserted.

Defendants' cryptic argument in support of the relief requested neglects to mention, no less address either (1) the 2003 concession of liability underscored by plaintiffs, or (2) the absence of a statute of limitation defense in their original or amended answer. Perhaps that is not surprising in that each of the two occurrences gave rise to a waiver of the affirmative defense, thereby derailing as a matter of law defendants' "eleventh hour" effort to reconfigure the temporal component of the class definition.

It is obvious that the 2003 concession of liability constitutes a waiver because by its very nature it disavows the defense of a time bar. And defendants' failure to include the subject affirmative defense either in a CPLR § 3211(a)(5) motion to dismiss or in their answer - instead broaching it post-

concession and after the general damages trial - similarly constitutes a waiver. Augenblick v. Town of Cortlandt, 66 N.Y.2d 775, 777 (1985) ("Respondents waived their statute of limitations defense by failing to plead it in their answer or by appropriate motion"); see also Robinson v. Canniff, 22 A.D.3d 219, 220 (1st Dep't 2005); Mendez v. Steen Trucking, Inc., 254 A.D.2d 715, 716 (4th Dep't 1998).<sup>15</sup>

In sum, defendants' claim that the class must be redefined given the dismissal of the federal constitutional cause of action is unconvincing. Defendants fail to explain how that dismissal somehow affects the state law of waiver vis-a-vis affirmative defenses. In the Court's view, the two subjects are wholly distinct.

#### CONCLUSION

For the reason indicated: (1) the attorneys for the plaintiff class are awarded \$3,836,000 in counsel fees, plus reimbursement for litigation expenses in the amount of \$182,030.25, for a total of \$4,018,030.25 and (2) their

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<sup>15</sup> Incidentally, the result would be the same under federal law. See Federal Rule of Civil Procedure 8(c)(1); see also Green v. United States, 260 F.3d 78, 85 (2d Cir. 2001); Pino v. United States, 2004 WL 1320888, at \*2 (S.D.N.Y. June 14, 2004); Mei Int'l, Inc. v. Schenkers Int'l Forwarders, Inc., 807 F. Supp. 979, 989 (S.D.N.Y. 1992).

application for service awards is denied.

Defendants' application to redefine the class is denied.

SO ORDERED.

Dated: April 7, 2014  
Central Islip, New York

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DENIS R. HURLEY, U.S.D.J.